Filed 6/7/17 In re S.H. CA6

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

In re S.H., a Person Coming Under the Juvenile Court Law.	H044060 (Santa Clara County Super. Ct. No. 116JD023868)
SANTA CLARA COUNTY DEPARTMENT OF FAMILY AND CHILDREN'S SERVICES, Plaintiff and Respondent, v. R.B., Defendant and Appellant.	

Appellant R.B. (mother) challenges the juvenile court's dispositional order removing eight-year-old S.H. (the child) from her custody. Mother makes two contentions. First, she claims that the court erred in postponing until after the dispositional hearing a decision as to whether the Indian Child Welfare Act (ICWA) applied. Second, mother asserts that, by going forward with disposition without an ICWA finding, the court impliedly and erroneously found that respondent Santa Clara County Department of Family and Children's Services (the Department) had complied with the ICWA's notice provisions. Mother claims that the ICWA notices sent to the tribes by the Department were inadequate because the notices did not contain the

maternal grandmother's place of birth, even though the Department had access to this information. The Department argues that mother's contentions are moot because the juvenile court subsequently made a finding "that the [ICWA] does not apply." The Department also contends that mother invited any alleged error in delaying the ICWA finding by agreeing to the postponement. We conclude that this appeal is not moot, mother did not "invite" the juvenile court's error, and the Department's ICWA notices were inadequate. We therefore reverse the court's dispositional order and remand for compliance with the ICWA's notice provisions.

I. Background

Mother "has a Bi-Polar diagnosis," suffers from depression, anxiety, and PTSD, and has been diagnosed with "brain cancer." On May 1, 2016, the child was taken into protective custody after mother assaulted the child. Mother was placed on a Welfare and Institutions Code section 5150[1] hold. The Department filed a section 300 petition on May 3. At that time, the whereabouts of the child's father (father) were unknown.[2]

On May 3, 2016, mother told the social worker that she "has Blackfoot and Cherokee Indian descent." The social worker spoke to the maternal grandmother, Sharon H., and she told the social worker "that she thinks the maternal family has some Indian ancestry, but did not know the tribe." She also told the social worker that "tribes were noticed" in a previous dependency case for the child and the child's older brother, and "no Indian descent was identified for the family." Sharon H., who had adopted the child's older brother, asked to be "assessed as a relative foster home" for the child.

At the May 4, 2016 detention hearing, the court ordered the child detained and directed the Department to send ICWA notices. The child was placed in foster care.

---

[1] Subsequent statutory references are to the Welfare and Institutions Code.

[2] The child had never met father, but she had spoken to him on the telephone.

Father was located on May 13. He expressly disclaimed any Indian heritage. On May 17, the Department sent ICWA notices to all of the federally recognized Cherokee and Blackfeet tribes. These notices included Sharon H.'s name, address, and birthdate, but not her place of birth, and they also provided some information about the child's other maternal relatives. The Department subsequently filed certified mail return receipts for these notices from the Blackfeet Tribe of Montana, the Bureau of Indian Affairs (BIA), the Secretary of the Interior, and the three Cherokee tribes. Two of the three Cherokee tribes and the Blackfeet Tribe responded to the notices with letters stating that the child was not registered or eligible to register as a member based on the information provided in the May 2016 notices.

On a May 25, 2016 "Parental Notification of Indian Status" ICWA-020 form, mother stated that she might have "Cherokee and Blackfoot" heritage and that Sharon H. "has info." On that same day, mother told the court that Sharon H. would be the person with "the most information" about her Indian heritage.

By June 2016, Sharon H.'s home had been approved for placement of the child, but placement could not proceed so long as mother was living with Sharon H. The child remained in foster care. Mother moved to a different residence, and the child began living at Sharon H.'s home in mid-August.

On September 15, 2016, the Department sent out a second set of ICWA notices to the same tribes. These notices contained the same information about the child and the child's maternal relatives that had been in the first set of notices, but the new notices also contained information about father and his family, who did not claim any Indian heritage.

The contested jurisdictional hearing was held on September 23, 2016. After the court made its jurisdictional findings, the parties asked the court to proceed to disposition. Disposition was largely uncontested except for mother's objection to a psychological evaluation of her. The court asked the Department "what finding if any do you request under the [ICWA]," and the Department responded "just that notice is

required." The Department's trial counsel explained that "return receipts are still outstanding" for the second set of ICWA notices.[3] She told the court that the Department's "legal position is that we should continue the [disposition] hearing until the ICWA notices are back." The court asked her if "it is permissible for the parties to stipulate to go forward with disposition with the agreement that we come back within 30 days to make findings under the [ICWA]?" She said "Yes." After the court expressed concern about doing so, mother's trial counsel asked if the court could "rely on" the ICWA finding in the previous dependency case involving the child. The court explained that it could not do so.

The Department's trial counsel asked the court to "go forward with disposition," set a hearing within 30 days when "[w]e will hopefully have the green return receipts by then to perfect ICWA," and, "[i]f for some reason there is a tribe that needs to be involved," "und[o]" the disposition order and "redo it" under the ICWA. Mother's trial counsel expressly endorsed this plan. The court then agreed to proceed with disposition while "reserv[ing] findings under the [ICWA] . . . ."

The court removed the child from mother's custody, ordered a psychological evaluation of mother, granted reunification services to mother, and approved of a "relative home placement" for the child. It set a hearing on "compliance with the [ICWA]" for October 25, 2016 "as well as consideration of transfer out."

On October 4, 2016, mother timely filed a notice of appeal from the court's "September 23, 2016 jurisdictional findings and orders." At the October 25 hearing, the court found "that ICWA notice is proper and that the [ICWA] does not apply." It also transferred the case to San Joaquin County.

---

[3] "No foster care placement or termination of parental rights proceeding shall be held until at least ten days after receipt of notice by the parent or Indian custodian and the tribe or the Secretary." (25 U.S.C. § 1912(a).)

II. Analysis

Mother contends that the ICWA notices sent to the tribes by the Department were inadequate because they failed to include the maternal grandmother's place of birth. The Department does not address this issue. It contends that mother cannot challenge the adequacy of the ICWA notices in this appeal because the juvenile court made an ICWA finding at its post-disposition October 2016 hearing rather than at the disposition hearing.

The Department relies on *In re M.R.* (2017) 7 Cal.App.5th 886 (*M.R.*). In *M.R.*, the Fourth District Court of Appeal "decline[d] [the appellant's] invitation to assess the adequacy of an ICWA noticing process that is, as best we can determine from the record in this appeal, still ongoing." (*M.R.*, at p. 904.) The juvenile court in *M.R.* had proceeded with disposition without making ICWA findings as to two of the children. In a footnote, the Fourth District asserted that it could address "any claims of error that arise from . . . the juvenile court's final rulings with respect to ICWA matters, in a subsequent appeal, if and when any is brought." (*M.R.*, at p. 904, fn. 9.) The Fourth District cited no authority for its statements.

Although this case, like *M.R.*, is one in which the juvenile court postponed making an ICWA finding until after the dispositional hearing, in this case, unlike in *M.R.*, the original ICWA noticing process was complete before the dispositional hearing and even the second ICWA noticing process is plainly complete now. Moreover, the Department has had this court judicially notice the fact that the juvenile court found at the October 2016 hearing that the ICWA did not apply. Since both sets of notices were sent prior to the juvenile court's disposition order, it would serve no purpose for us to delay resolution of this issue pending some hypothetical subsequent appeal. "[S]wift and early resolution of ICWA notice issues is ideal." (*In re Isaiah W.* (2016) 1 Cal.5th 1, 12.) Indeed, the Department does not suggest that the juvenile court's October 2016 post-disposition ICWA finding was itself an appealable order. Indefinitely delaying resolution of ICWA

noticing issues that are presented to us in this appeal would serve no purpose, and we decline the Department's invitation to do so.

The Department concedes that a juvenile court must make an ICWA finding before ordering that a child be placed in foster care. However, it argues that no ICWA finding was required in this case because the juvenile court authorized a "relative placement," which the Department claims "is not an order of foster care." The Department cites no authority for this proposition; none exists. Under the ICWA, "'foster care placement' . . . mean[s] any action removing an Indian child from its parent or Indian custodian for temporary placement in a foster home or institution or the home of a guardian or conservator where the parent or Indian custodian cannot have the child returned upon demand, but where parental rights have not been terminated." (25 U.S.C. § 1903(1)(i).) Since the juvenile court ordered the child removed from parental custody and placed "where the parent . . . cannot have the child returned upon demand," the placement was a foster care placement. Hence, an ICWA finding was required before the court could order this placement.

It follows that the juvenile court erred in failing to make an ICWA finding before entering a dispositional order. The Department claims that this error was "harmless" because mother's trial counsel "invited" the error. The Department acknowledges that a parent cannot waive a tribe's right to adequate ICWA notices. (*Guardianship of D.W.* (2013) 221 Cal.App.4th 242, 249.) However, it relies on *In re G.P.* (2014) 227 Cal.App.4th 1180 (*G.P.*) to support its claim that mother "invited" the error by agreeing to the postponement. *G.P.* is distinguishable. In *G.P.*, the father appealed from the termination of his parental rights on the ground that the juvenile court had failed to make a detriment finding. At the hearing below, the Agency had asked the court to make a detriment finding, but the father's trial counsel had insisted that a detriment finding was not "appropriate." (*G.P.*, at pp. 1193-1194.) The Court of Appeal found that "[f]ather's counsel made a tactical decision to forgo a detriment finding," and it concluded that the

error was invited. (*Id.* at pp. 1195-1196.) Here, in contrast, the *Department* asked the court to postpone the ICWA finding, and mother's trial counsel merely acquiesced. The doctrine of invited error applies only where "'counsel acted *for tactical reasons* and not out of ignorance or mistake.'" (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 49, italics added.) The record before us contains no suggestion that mother's trial counsel had any "tactical" reason for acquiescing in the postponement of the ICWA finding. Accordingly, we reject the Department's "invited error" claim.

We find some merit in the Department's contention that the court's error *in postponing the ICWA finding* would be moot in light of the court's subsequent ICWA finding. We would not reverse the court's dispositional order solely because the court made a valid ICWA finding after, rather than before, the dispositional order. However, we agree with mother that the court's dispositional order necessarily implied a finding that the ICWA did not apply, which requires us to evaluate the validity of that implied finding. Such an implied finding necessarily includes a finding that the ICWA notices themselves were adequate. That issue is properly before us in this appeal because both sets of ICWA notices are in the record before us. We therefore reject the Department's claim that we cannot review the adequacy of the ICWA notices in this appeal. This issue is not "moot." If the ICWA notices were inadequate, the juvenile court's dispositional order cannot stand. We proceed to the merits of mother's challenge to the adequacy of the ICWA notices.

Mother contends that the ICWA notices sent by the Department were inadequate because they did not include the birthplace of Sharon H., the maternal grandmother. Federal regulations governing ICWA notices, which set forth the "*minimum* Federal standards to ensure compliance with ICWA," require that ICWA notices include, "[i]f known, the names, birthdates, *birthplaces*, and Tribal enrollment information of other direct lineal ancestors of the child, such as *grandparents*." (25 C.F.R. §§ 23.106(a), 23.111(d)(3), italics added.) The information in the ICWA notices was provided by

Sharon H., and it included her birthdate, the names of her parents, and the birthplaces of some of her lineal ancestors. It is inconceivable that the Department could not have learned Sharon H.'s birthplace given that she was involved in this dependency case from the very beginning, the Department approved her home for placement, and the child was placed in Sharon H.'s home well before the dispositional hearing and well before the second set of ICWA notices was sent. This basic information, mandated by the minimum federal standards, must have been known or at least readily available to the Department when it prepared the ICWA notices. The Department's failure to include this information was a violation of the federal standards for ICWA notices.

Mother concedes that harmless error review applies to the failure to include information in ICWA notices, but she claims that this omission was prejudicial. "Deficiencies in an ICWA notice are generally prejudicial but may be deemed harmless under some circumstances." (*In re E.W.* (2009) 170 Cal.App.4th 396, 402.) "An ICWA notice violation may be held harmless when the child's tribe has actually participated in the proceedings [citation] or when, even if notice had been given, the child would not have been found to be an Indian child, and hence the substantive provisions of the ICWA would not have applied." (*In re S.B.* (2005) 130 Cal.App.4th 1148, 1162; see also *In re Brandon T.* (2008) 164 Cal.App.4th 1400, 1414.) "One of the purposes of giving notice to the tribe is to enable it to determine whether the minor is an Indian child. [Citation.] Notice is meaningless if no information or insufficient information is presented to the tribe to make that determination. . . . The burden is on the Agency to obtain all possible information about the minor's potential Indian background and provide that information to the relevant tribe or, if the tribe is unknown, to the BIA. [Citation.]" (*In re Louis S.* (2004) 117 Cal.App.4th 622, 630 (*Louis S.*).)

On the record before us in this case, we cannot say that the omission of Sharon H.'s birthplace did not impact the ability of each of the tribes to conduct "a meaningful search" of tribal records to determine whether the child was an Indian child. (*Louis S.*,

supra, 117 Cal.App.4th at p. 631.) Since Sharon H. was the person through whom the child would have acquired any Indian heritage, information about her was critical to a determination of the child's status. The appropriate remedy is a limited remand for proper ICWA noticing.

III. Disposition

The juvenile court's dispositional order is reversed. On remand, the court shall require the Department to fully comply with the ICWA's notice requirements. If any of the tribes identify the child as an Indian child, the court shall proceed in accordance with the ICWA. If none of the tribes identify the child as an Indian child, the court shall reinstate its dispositional order.

_____
Mihara, J.

WE CONCUR:

_____
Elia, Acting P. J.

_____
Bamattre-Manoukian, J.

In re S.H.
H044060